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No. 90-989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CALDOR, INC.,
Petitioner,

v.

COMMISSIONER OF CONSUMER PROTECTION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Connecticut

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. THE STATE MISCHARACTERIZES PETITIONER'S RELIANCE ON *PEEL v. ATTORNEY REG. & DISCIPLINARY COM'N* IN AN EFFORT TO OBTAIN A LOWER STANDARD OF REVIEW OF THIS REGULATION

Petitioner Caldor, Inc. ("Caldor"), relies on *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, —— U.S. ——, 110 S.Ct. 2281 (1990), for the proper standard of review to be applied in this case because the lower court review in *Peel*, by the Illinois Supreme Court, focused on acceptance of administrative

findings without challenging their support, as the Connecticut Supreme Court did in this case. In its response, the state claims that "*Peel* did not involve review of an administrative agency's or lower court's findings of deception. . . . It was undisputed that the facts stated in the advertising were true and verifiable." (Resp. Brief at p. 7). This statement is a mischaracterization of how this Court described the *Peel* record below:

> Although the Commission's "Findings of Facts" did not contain any statement as to whether petitioner's representation was deceptive, its "Conclusion of Law" ended with the brief Statement that petitioner,
>
> > by holding himself out, on his letterhead as 'Gary E. Peel, Certified Civil Trial Specialist—By the National Board of Trial Advocacy,' is in direct violation of the above cited Rule [2-105(a)(3)].
> >
> > We hold it is 'misleading' as our Supreme Court has never recognized or approved any certification process. *Id.*, at 20a.
>
> The Illinois Supreme Court adopted the Commission's recommendation for censure. It held that the First Amendment did not protect petitioner's letterhead because the letterhead was misleading in three ways . . .

Peel, supra, —— U.S. at ——, 110 S.Ct. at 2286. Hence, the Illinois State Supreme Court specifically found the letterhead misleading. Thus, as in this case, the central issue in *Peel* involved the misleading nature of advertising and whether or not the regulation of that advertising could be upheld under the First Amendment. As in *Peel*, the procedural posture of this case requires a reviewing court to exercise *de novo* review to determine whether the challenged speech is misleading. *Peel, supra,* —— U.S. —— at ——, 110 S.Ct. at 2291-92.

II. FIRST AMENDMENT PROTECTION DOES NOT DEPEND UPON THE SOURCE OF THE LEGISLATIVE ACTION

The mere fact that this regulation emanated from an administrative agency does not insulate it from First Amendment analysis. The respondent insists that this is not a constitutional challenge (Resp. Brief at 8), because petitioner simply challenged the commissioner's authority and thus, entitles Caldor only to a lower threshold of review, *i.e.*, whether the commissioner abused her discretion, without regard to the constitutional constraints on the commissioner's authority.

First, the respondents evaded First Amendment *de novo* review in the lower courts by the mere reliance on the genesis of this regulation being an administrative agency. Second, respondents' reference to *Harry & Bryant Co. v. FTC*, 726 F.2d 993, *cert. denied*, 469 U.S. 820, 105, S.Ct. 91 (1981), is inapposite as *Bryant* did not hold that a regulatory authority could not be challenged, but simply determined than on evidence before the court the agency action was reasonably necessary to prevent future deception. *Id.*, 726 F.2d at 1002. No case could be more inapposite to the issue at hand. Here, as noted in the dissent of Justice Covello, there was a complete absence of any evidence in the record to support the commissioner's findings. *Caldor v. Heslin*, 215 Conn. 590, 603 (1990) (Pet. App. 13a) (Covello, J., dissenting), and the majority made no attempt to look at the evidence. *Id.*, 215 Conn. at 595 (Pet. App. 6a).

III. RESPONDENTS' CLAIM THAT THIS IS SIMPLY AN OVERBREADTH CHALLENGE SHOULD BE DISREGARDED

Petitioner does not claim the regulation is overbroad, but rather that the regulation is not narrowly tailored to achieve the stated purpose. Because petitioner makes no such argument, respondents' remarks addressed to an

overbreadth argument should be disregarded. (*See* Resp. Brief, p. 12). As respondents concede, no amount of disclosure would make net price advertising immune from this regulation. (Pet. Brief at 4, Pet. App. at 23a-24a). The respondents apparently interpret this as a claim of overbreadth. The misreading by the respondents only serves to emphasize the inherent difficulties with the current application of First Amendment protections in the context of allegedly deceptive advertising. As in *Peel*, the overbreadth doctrine has no relevance to this analysis. *Peel, supra*, —— U.S. at ——, 110 S.Ct. at 2291, n.15.

The brief of the respondent illustrates the confusion existing in the courts as to the application of the commercial free speech doctrine, and specifically what level of record or empirical evidence is required to support the findings of potentially misleading or inherently misleading advertising. In addition, these issues need to be addressed in the context of an administrative agency attempting to control consumer conduct through its regulation, without record evidence of a tendency to deceive.

Respectfully submitted,

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